



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

Brett Kappel  
Arent Fox  
1717 K Street, NW  
Washington, DC 20036

**DEC 17 2014**

RE: MUR 6795  
Melanie Sloan  
Citizens for Responsibility and  
Ethics in Washington (CREW)


Dear Mr. Kappel:

On March 18, 2014, the Federal Election Commission notified your clients of the complaint in MUR 6795 alleging that Melanie Sloan and Citizens for Responsibility and Ethics in Washington (CREW) violated the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint was forwarded to your clients at that time.

On December 9, 2014, the Commission voted to dismiss the matter and close the file. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Peter Reynolds, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,  
  
William A. Powers  
Assistant General Counsel

Enclosure

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Citizens for Responsibility and Ethics in Washington MUR: 6795  
Melanie Sloan

I. INTRODUCTION

This matter was generated by a complaint<sup>1</sup> alleging that Citizens for Responsibility and Ethics in Washington ("CREW") failed to report independent expenditures to the Commission and comply with certain reporting requirements of political committees, in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). However, as discussed below, even if certain of CREW's communications at issue in the Complaint constituted independent expenditures, under the circumstances, the Commission concludes that further enforcement action would not be an efficient use of the Commission's resources and exercises its prosecutorial discretion to dismiss the matter.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

CREW is a 501(c)(3) nonprofit corporation "dedicated to promoting ethics and accountability in government and public life."<sup>2</sup> The Complaint in this matter alleges that beginning on September 15, 2010, CREW launched a "public relations campaign ... attacking Christine O'Donnell as a candidate for election."<sup>3</sup> According to the Complaint, CREW violated

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<sup>1</sup> See 52 U.S.C. § 30104(g)(a)(1) (formerly 2 U.S.C. § 437(g)(a)(1)).

<sup>2</sup> Resp. at 8.

<sup>3</sup> Compl. at 4.

1 the Act by failing to report several communications to the Commission as independent

2 expenditures.<sup>4</sup> These communications include:

- 3 • Four press releases from CREW's website;<sup>5</sup>
- 4
- 5 • Four television appearances by CREW's executive director Melanie Sloan (two
- 6 on *Anderson Cooper 360°*, one on *The Ed Show*, and one on *The Situation Room*
- 7 with *Wolf Blitzer*);<sup>6</sup>
- 8
- 9 • A news article appearing in the *The News Journal* discussing complaints CREW
- 10 filed with the Commission and the U.S. Attorney's Office against O'Donnell;<sup>7</sup>
- 11
- 12 • An article appearing on Ricochet.com containing clips of Sloan's quotes from
- 13 other sources;<sup>8</sup>
- 14
- 15 • An op-ed authored by Sloan that appeared in *The News Journal*;<sup>9</sup>
- 16
- 17 • A mass email soliciting donations to CREW;<sup>10</sup> and

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<sup>4</sup> *Id.* at 5. In arguing that CREW was required to report its activities as independent expenditures, the Complaint cites both 11 C.F.R. § 104.4 (covering independent expenditures by political committees) and 11 C.F.R. § 109.10 (covering independent expenditures by persons who are not political committees).

<sup>5</sup> Compl., Exs. B, D, E, I. The September 15, 2010 press release (Comp., Exhibit B) stated that O'Donnell has demonstrated "a disturbing pattern of fraud, lies and fiscal irresponsibility" and "a total disregard of ethics and integrity," and as a result is named to CREW's list of "Most Crooked Candidates." *Id.*, Ex. B. The press release then states that "[w]e shouldn't have crooks, liars or frauds on the ballot and we shouldn't have to worry that the Most Corrupt Candidates will someday grow up to become the Most Corrupt Members of Congress." *Id.*

The September 20, 2010 press release (Comp., Exhibit E) referred to O'Donnell as a "criminal" and a "crook" who "embezzle[d] money from her campaign", and concluded that "thieves belong in jail not in the United States Senate." *Id.*, Ex. E.

<sup>6</sup> *Id.*, Exs. C-1 to C-8.

<sup>7</sup> *Id.*, Ex. F.

<sup>8</sup> *Id.*, Ex. G.

<sup>9</sup> *Id.*, Ex. H.

<sup>10</sup> *Id.*, Ex. J. The email identifies O'Donnell as a "thief" and a "crook" and states that "[t]he last thing the country needs is for one of today's Crooked Candidates to grow up and become one of tomorrow's Most Corrupt Members of Congress." *Id.* The term "Crooked Candidates" also links to CREW's list of "Most Crooked Candidates," which includes O'Donnell. *Id.* The Complaint also alleges that CREW "engaged in substantially

- A 3,000 signature petition drive “calling for Ms. O’Donnell to be prosecuted” as described in CREW’s 2010 Annual Report.<sup>11</sup>

The Complaint further alleges that CREW received contributions earmarked for political purposes, and that CREW was required to report them pursuant to the disclosure rules governing political committees.<sup>12</sup> It also states that CREW “spent more than \$5,000 on [its] campaign against Christine O’Donnell ... including in Melanie Sloan’s time and salary.”<sup>13</sup>

In its Response, CREW states that none of the communications identified in the Complaint qualified as express advocacy under 11 C.F.R. § 100.22(b), and thus they were not independent expenditures.<sup>14</sup> According to CREW, “[e]ven if the payment of Ms. Sloan’s salary could be construed as an expenditure in connection with a federal election, [the] complaint would still fail because none of the public statements Ms. Sloan made regarding the September 20th complaints meets the definition of an independent expenditure under FECA or FEC regulations.”<sup>15</sup> CREW further contends that the statements made by Sloan during her television

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identical or similar communications by the use of regular mail (“direct mail”) and through other means.” *Id.* at 15. There is no available information about these documents.

<sup>11</sup> *Id.* at 10-11, Ex. K.

<sup>12</sup> *Id.* at 14-15.

<sup>13</sup> *Id.* at 12. This \$5,000 figure is based on the complaint’s assertion that “Sloan spent at least 43.5 hours” on this project. There is no available information to support this assertion.

<sup>14</sup> Resp. at 4-6.

<sup>15</sup> *Id.* at 4.

appearances, in her op-ed, and to newspaper reporters are covered by the press exemption.<sup>16</sup>

Lastly, CREW states that it is not a political committee.<sup>17</sup>

### B. Analysis

The Act places certain reporting and disclaimer requirements on persons who make independent expenditures.<sup>18</sup> An “independent expenditure” is an expenditure by a person expressly advocating the election or defeat of a clearly identified federal candidate that is not coordinated with a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.<sup>19</sup> Under the Commission’s regulations,<sup>20</sup> three of CREW’s communications at issue in the Complaint might be considered to have expressly advocated the election or defeat of a clearly identified federal candidate: (1) its September 15 press release (Comp., Exhibit B); (2) its September 22 mass email (Comp., Exhibit J); and (3) its September 20 press release (Comp., Exhibit E).<sup>21</sup> Yet, even assuming, *arguendo*, that any of the communications at issue here contained express advocacy, the Commission concludes that further enforcement action would not be an efficient use of the Commission’s resources and exercises its prosecutorial discretion to dismiss the matter.

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<sup>16</sup> *Id.* at 6-7.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> 2 U.S.C. §§ 434(c), 434(g), 441d; 11 C.F.R. §§ 109.10, 110.11.

<sup>19</sup> 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

<sup>20</sup> *See* 11 C.F.R. § 100.22 (defining “expressly advocating”).

<sup>21</sup> The remaining communications at issue in the Complaint may not contain express advocacy or were not available to the Commission.

1 The Act requires persons who are not political committees to report independent  
2 expenditures only when they aggregate in excess of \$250 with respect to a given election in a  
3 calendar year.<sup>22</sup> In this case, it does not appear that the costs of posting press releases on  
4 CREW's website and sending a mass email would have triggered the \$250 independent  
5 expenditure reporting threshold<sup>23</sup> or the Act's \$1,000 threshold for political committee status.<sup>24</sup>

6 There is no available information for the Commission to assess any additional costs  
7 associated with these communications. Nonetheless, under the circumstances, the Commission  
8 concludes that further enforcement action would not be an efficient use of the Commission's  
9 resources. Accordingly, the Commission exercises its prosecutorial discretion to dismiss the  
10 matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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<sup>22</sup> 11 C.F.R. § 109.10(b).

<sup>23</sup> As the Commission has noted in its Explanation and Justification relating to Internet Communications, "there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients . . . ." 71 Fed. Reg. 18,594, 18,596 (Apr. 12, 2006) (explaining why email is not a form of "general public political advertising").

<sup>24</sup> *See* 2 U.S.C. § 431(4); 11 C.F.R. § 100.5. Because it is unlikely that political committee status was triggered here, the Commission need not address committee the Complaint's allegations that CREW was subject to certain reporting requirements as a political committee.